

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALICE HARPER</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>KAPS, INC.</b>	)	
Respondent	)	Docket No. 1,052,084
	)	
AND	)	
	)	
<b>EMCASCO INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Bretz Law Offices, LLC, (Bretz) requested review of the August 15, 2011, Order Apportioning Attorney Fees and the August 23, 2011, Order Apportioning Attorney Fees Nunc Pro Tunc-Revised entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on November 18, 2011. The Director appointed E. L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample and Joseph Seiwert to serve in place of current Board Member Tom Arnhold, who recused himself from this matter.<sup>1</sup> Matthew L. Bretz, of Hutchinson, Kansas, appeared for appellant Bretz. Mitchell W. Rice, of Hutchinson, Kansas, appeared for Mann Law Offices L.L.C. (Mann). Kirby A. Vernon, of Wichita, Kansas, who represents respondent and its insurance carrier, did not file a brief or participate in oral arguments.

The Administrative Law Judge (ALJ) allocated 90 percent of the attorney fees to Bretz and 10 percent of the attorney fees to Mann. Both Bretz and Mann were awarded reimbursement of its respective expenses. Bretz was ordered to reimburse Mann for the cost of copying claimant Alice Harper's file.

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<sup>1</sup> As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Kinch will continue to serve as a Board Member Pro Tem in this case.

### ISSUES

Bretz requests review of the ALJ's finding that it was only entitled to 90 percent of the attorney fees in this case, arguing it should be entitled to 100 percent of the attorney fees because all the work to prepare the claim and determine its settlement value was performed while Bretz was handling the claim. Further, Bretz contends Mann settled the case for \$1,000 less than a settlement offer that had been extended before Mitchell Rice's termination from the Bretz firm. Bretz also argues that it should not be limited to fees based solely on *quantum meruit* because it was discharged without cause. In the event the Board finds Bretz is limited to fees based on *quantum meruit*, it should not be calculated solely on number of hours worked multiplied by a reasonable rate.<sup>2</sup>

Mann argues that the Board should determine the value of Bretz' lien on the attorney fees based upon *quantum meruit*. Mann argues that the file was not with Bretz for long enough even to go to a prehearing settlement conference and that the settlement did not occur before Bretz' representation was terminated by Alice Harper. Mann also asks that the Board affirm the ALJ's order giving it a credit of \$84.75 for expenses in getting a copy of Alice Harper's case file and its claim for expenses in the amount of \$145.62.

The issues for the Board's review are:

- (1) How should the attorney fees in this case be divided between Bretz and Mann?
- (2) Should Bretz reimburse Mann for the costs of photocopying claimant's file?

### FINDINGS OF FACT

Alice Harper contacted Bretz concerning a possible workers compensation and/or tort claim in mid-2010. On August 6, 2010, she signed an employment contract with Bretz, hiring Bretz to represent her in a workers compensation claim. The case was handled for Bretz by Mitchell Rice, who at the time was an associate in the Bretz law firm. During the time of Bretz' representation, claimant was sent to Dr. Pedro Murati and to Robert Barnett, Ph.D. A settlement offer was received from respondent on December 1, 2010, in the amount of \$3,602.02, which was turned down. A second settlement offer was received on March 14, 2011, in the amount of \$10,000. That offer was also turned down, and Bretz extended a \$40,000 settlement offer to respondent on March 15, 2011.

On March 15, 2011, Mr. Rice's employment with Bretz was terminated. On March 21, 2011, Mr. Rice wrote Ms. Harper and informed her he was no longer employed by Bretz and advising her she would need to choose whether to let him continue to

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<sup>2</sup> Bretz also argues that the ALJ's Order, which awarded Bretz 90 percent of the total attorney fees, was the result of the ALJ's prejudice—presumably meaning prejudice against Bretz. Bretz brief (filed Sept. 21, 2011) at 7.

represent her or remain with Bretz. On March 22, 2011, Ms. Harper signed a letter indicating that she would prefer to have Mr. Rice represent her. Shortly thereafter, Mr. Rice became associated with the firm of Mann, and on April 1, 2011, Ms. Harper signed a contract employing the Mann firm to represent her interests in the workers compensation claim. Bretz filed a Notice of Attorney Fee Lien claiming a 25 percent attorney fee lien upon all compensation made in Ms. Harper's workers compensation claim.

Mr. Rice requested Ms. Harper's workers compensation file. He received it only after paying Bretz a copying fee of \$87.45.

Mr. Rice, on behalf of the Mann firm, continued to negotiate a settlement in Ms. Harper's claim. The claim was eventually settled for the amount of \$9,000, and a Settlement Hearing was held on July 5, 2011, approving the settlement.<sup>3</sup> The attorney fees on the settlement were \$2,250, and that amount was withheld from the settlement by respondent. Because of the Bretz lien, the amount of \$2,500 was withheld from the settlement by respondent to cover Bretz' expenses, and \$145.62 was withheld to cover Mann's expenses. Ms. Harper was issued a check in the amount of \$4,104.38.

Because Bretz was handling Ms. Harper's claim on a contingency fee basis, no record was kept of the amount of time it spent on the claim. Bretz attached an itemization of time spent prepared by the firm estimating the amount of time spent working on Ms. Harper's claim. That itemization shows the Bretz firm spent approximately 27.15 hours working on Ms. Harper's claim from June 25, 2010, through August 8, 2011. Bretz also provided the court with a list of expenses in the amount of \$1,175.24 incurred during its representation of Ms. Harper.

Mr. Rice disputes the amount of time Bretz estimates was spent on Ms. Harper's claim. He signed an affidavit on August 9, 2011, stating his best estimate was that he spent 10 hours on Ms. Harper's claim while working at Bretz. The affidavit indicates he spent 21.85 hours working on Ms. Harper's claim since leaving Bretz.

In its Order Apportioning Attorney Fees Nunc Pro Tunc-Revised, the ALJ found Bretz was entitled to its expenses and 90 percent of the attorney fees, but was to reimburse Mann the amount of \$87.45 for the cost of copying Ms. Harper's file. Respondent was directed to issue a check in the amount of \$1,346.36 to Ms. Harper for the balance of her settlement; a check in the amount of \$458.07 to Mann (10% of \$2,250 + expenses of \$145.62 + copy fees of \$87.45); and a check in the amount of \$3,091.19 to Bretz (90% of \$2,250 + expenses of \$1,153.64 less copy fees of \$87.45).

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<sup>3</sup> During oral argument to the Board, Mr. Rice explained that the value of the case was reduced after a court-ordered IME report indicated that the injury was to a scheduled member as opposed to the body as a whole.

**PRINCIPLES OF LAW**

The attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the disability compensation recovered.<sup>4</sup> Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.<sup>5</sup>

The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.<sup>6</sup> The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 44-536(b), which specifically includes:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney . . .
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and<sup>7</sup>
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must

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<sup>4</sup> See K.S.A. 44-536(a).

<sup>5</sup> See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

<sup>6</sup> K.S.A. 44-536(h).

<sup>7</sup> See Kansas Rules of Professional Conduct 1.5 (Fees) (2010 Kan. Ct. R. Annot. 458).

exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.<sup>8</sup>

In *Madison*,<sup>9</sup> the Kansas Court of Appeals ruled that attorneys who are discharged before the contingency provided in a contingency fee contract may not, generally, recover the contingency fee. Instead, the fees are to be determined based upon the reasonable value of the services the attorney has rendered, or under *quantum meruit*. And in that same opinion, the Kansas Court of Appeals cited both *In re Phelps*<sup>10</sup> and *Shouse v. Consolidated Flour Mills Co.*<sup>11</sup> as establishing a similar rule when attorneys are discharged before completing the contracted services for stipulated attorney fees.

KRPC 1.6(d) (2010 Kan. Ct. R. Annot. 522) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The Kansas Bar Association (KBA) Legal Ethics Opinion No. 92-5 (July 30, 1992) states in part: "The purpose of [ABA Model Rules of Professional Conduct (MRPC)] 1.16(d) is protection of the client's interests, and the attorney's interests are incidental thereto."

The ABA Model Rules of Prof'l Conduct (2011 Annot.) R. 1.16 states:

Upon termination of representation, the lawyer has a duty to surrender promptly papers and other property to which the client is entitled. . . . In general, if a lawyer wishes to keep a copy of a client's file, the lawyer must assume the costs of copying documents generated or paid for by the client, although delivery and assemblage costs can normally be charged to the client.

KBA Legal Ethics Opinion No. 92-5 further states:

"Client's property" under MRPC 1.16(d) means counsel may charge a reasonable photocopy fee on that portion of a file which does not constitute "client's property," and which is requested to be photocopied by the client. "Client's

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<sup>8</sup> *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, Syl. ¶ 5, 663 P.2d 663 (1983).

<sup>9</sup> *Madison*, 8 Kan. App. 2d at 579.

<sup>10</sup> *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970).

<sup>11</sup> *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931).

property” includes (1) documents brought to the attorney by the client or client’s agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand and interpret documents highlighted above. Such documents, being “client property” must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of “client property” may be copied at a reasonable expense to the client such “expense” to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.

### CONCLUSION

The parties have argued several different approaches to apportioning the attorney fees. These range from awarding 100 percent of the fees to Bretz to splitting the fees equally between Bretz and Mann, as well as several possible divisions that would fall within those two extremes. Under circumstances such as this, the Board generally approaches the division of fees on the basis of *quantum meruit*, looking at the factors enumerated in the statute and the KRPC and, in particular, the time spent by the attorneys respectively. However, in this case, there is a marked difference of opinion concerning the accuracy of the itemizations of time submitted by the other attorney. The ALJ reasoned:

Under all of the circumstances, it does not appear that either of the approaches suggested by Bretz or Rice gives an adequate or equitable formula for division of the attorneys fees. The court will allocate 90% of the attorneys fees to Bretz (\$2,025), and the remainder of the attorneys fees to Rice. Bretz will also reimburse Rice for the cost of copying Harper’s file. The file was Harper’s, and Bretz’s interests were protected by its lien. By virtue of that lien, Bretz no longer had a right to retain Harper’s file. If Bretz wanted to retain a copy of the file, it should bear the expense of making that copy, not Harper, and not Rice.<sup>12</sup>

The Board finds that the ALJ’s apportionment of the attorney fees is reasonable and should be affirmed.

Some commentators draw a distinction between the client’s property, which must be returned to the client without charge, and work product of the attorney, for which a reasonable expense may be charged for photocopying.<sup>13</sup> In this case, however, no such distinction has been made and no itemization was provided whereby the Board could determine what charges were for copying client property versus what may be attorney work

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<sup>12</sup> ALJ Order Apportioning Attorneys Fees Nunc Pro Tunc Revised (filed Aug. 23, 2011) at 3.

<sup>13</sup> See KBA Legal Ethics Opinion 92-5; Peter H. Geraghty, Whose File Is It Anyway?, ABA E-news for Members September 2006.

product. Accordingly, the Board finds that Bretz should reimburse Mann for the cost of photocopying Harper's file.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the August 15, 2011, Order Apportioning Attorneys Fees and the August 23, 2011, Order Apportioning Attorneys Fees Nunc Pro Tunc-Revised entered by Administrative Law Judge Bruce E. Moore are affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Matthew L. Bretz, Attorney for Bretz Law Offices, LLC,  
Mitchell W. Rice, Attorney for Mann Law Offices L.L.C.  
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge